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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1965

No. 536

CHICAGO, ROCK ISLAND AND PACIFIC RAILROAD COMPANY
Petitioner

v.

McCONNELL HEAVY HAULING, INC.
Respondent

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ARKANSAS

BRIEF FOR THE RESPONDENT IN OPPOSITION

JACK HOLT, JR.
Counsel for Respondent
115 North State
Little Rock, Arkansas

PARAGON PRINTING CO., LITTLE ROCK

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QUESTION PRESENTED

The question presented is whether an agreement made by one interstate common carrier to pay another interstate common carrier for unloading railroad cars and delivery to missile site constitutes an illegal refund or rebate to a shipper under the Interstate Commerce Act and the Elkins Act, so that such agreement is unenforceable.

STATEMENT

Petitioners statement is for the most part substantially correct, however, Petitioners overlooked certain items which should be noted.

1. *How Federal Question is Presented.*

Upon Respondent, McConnell, filing its Complaint Petitioner, Rock Island, filed its Petition for removal to United States District Court (R.3). Subsequently, the District Court remanded McConnell's Cause of Action to the Circuit Court of Pulaski County (R.5).

The Supreme Court of Arkansas, in upholding the lower Court, held that a federal question was not presented in that, this is simply a case where there is an agreement between two carriers (Petition, P.15) and McConnell is endeavoring to recover for an indebtedness due for services performed under a hauling and unloading contract with Rock Island, (Petition, P.17).

2. *Undisputed Facts.*

In July of 1962, three representatives of the Petitioner, Rock Island, called upon F. O. McConnell, President of McConnell, Respondent, for the purpose of employing Respondent to unload steel materials from their rail cars at its rail site and transport such steel materials to certain missile sites in Arkansas. Rock Island's representatives were C. J. Novak, Special Representative; J. E. Tolin, General Agent, and a Mr. Alexander its Traveling Traffic Representative.

During a discussion of employment, no third party, as shipper, or otherwise was mentioned by the railroad representatives. McConnell gave to the representatives

of Rock Island copies of Steel Rate Tariff and agreed to perform unloading at its cost and transportation from rail site to missile site under its tariff schedule.

McConnell performed these services from September 1962 until March 1963, and billings were made to Rock Island for unloading and delivery in accordance with business practice and interstate commerce regulations.

McConnell had no contact or contract with Pan Handle Steel Corporation. All negotiations were with Rock Island.

Pan Handle Steel Corporation was not billed until a considerable time after first delivery and only then under Rock Island's directions was billing made to Pan Handle in care of Rock Island's Representative, Fort Worth, Texas.

The unloading charges as per cost totaled $3,097.25 and the hauling charges as per tariff rates totaled $2,855.00.

REASON FOR DENYING THE WRIT

As determined by United States District Court, the Circuit Court of Pulaski County and Supreme Court of Arkansas; a federal question has not been presented, nor do the federal statutes in cases cited by the Petitioners constitute authority under the facts presented.

The Supreme Court of Arkansas has properly characterized this controversy as being a matter of contract between two carriers. In addition, as pointed out by the Arkansas Courts, Rock Island is now asking that McConnell be required to do what it strenuously contends would be unlawful for them to do. McConnell, as a common carrier, cannot deviate from its own tariff schedule for such deviation would be an illegal rebate.

Rock Island, a common carrier, has under the undisputed facts, incurred an indebtedness with McConnell, another common carrier, for services performed in accordance with its agreement for the hauling and unloading of certain materials for and on behalf of Rock Island. Thus, this is a mere matter of contract, without federal question.

In the instant case the services rendered by Respondent to Petitioner are based upon a contract between it and the Petitioner for services in unloading and hauling steel material from Petitioner's rail site to missile site, without the knowledge or information on the part of Respondent that any third party, in any capacity, was concerned, involved or interested.

The Petitioner, as far as the Respondent knew or was concerned, stands in the position of the shipper, or consignor, and Respondent was acting as the initial carrier.

Respondent, in dealing directly with the railroad company, and no one else, which is undisputed, was as much bound to adhere to its tariff schedule in fixing its charges for its services, as is any other common carrier dealing only with the initial shipper.

The cases cited by Petitioner in its brief, and the principles set forth, are correct statements of law when applied to the particular facts in these cases; however, the factual situation in the instant case is completely different from the cases cited by Petitioner and are of no value to the Court. Factual situations in Petitioner's citations did not grow out of an independent contract made by one carrier with another carrier wherein there is no third party involved. Here, Respondent does not stand in the shoes of a consignee or as an agent of the consignor or of the Petitioner, but as a carrier bound to make its charges under its Steel Rate Tariff.

The indebtedness complained of here grows out of a contract which is only an incident of interstate shipment, and is not a liability springing from or created by any act of Congress. The only regulation of the Interstate Commerce Commission involved herein are the tariff rates required of the Respondent, McConnell Heavy Hauling, Inc., in fixing its charges for its services. No question of "illegal rebate" is involved.

The Petition for Writ of Certiorari should be denied.

Respectfully submitted,

JACK HOLT, JR.

Counsel for Respondent

115 North State

Little Rock, Arkansas